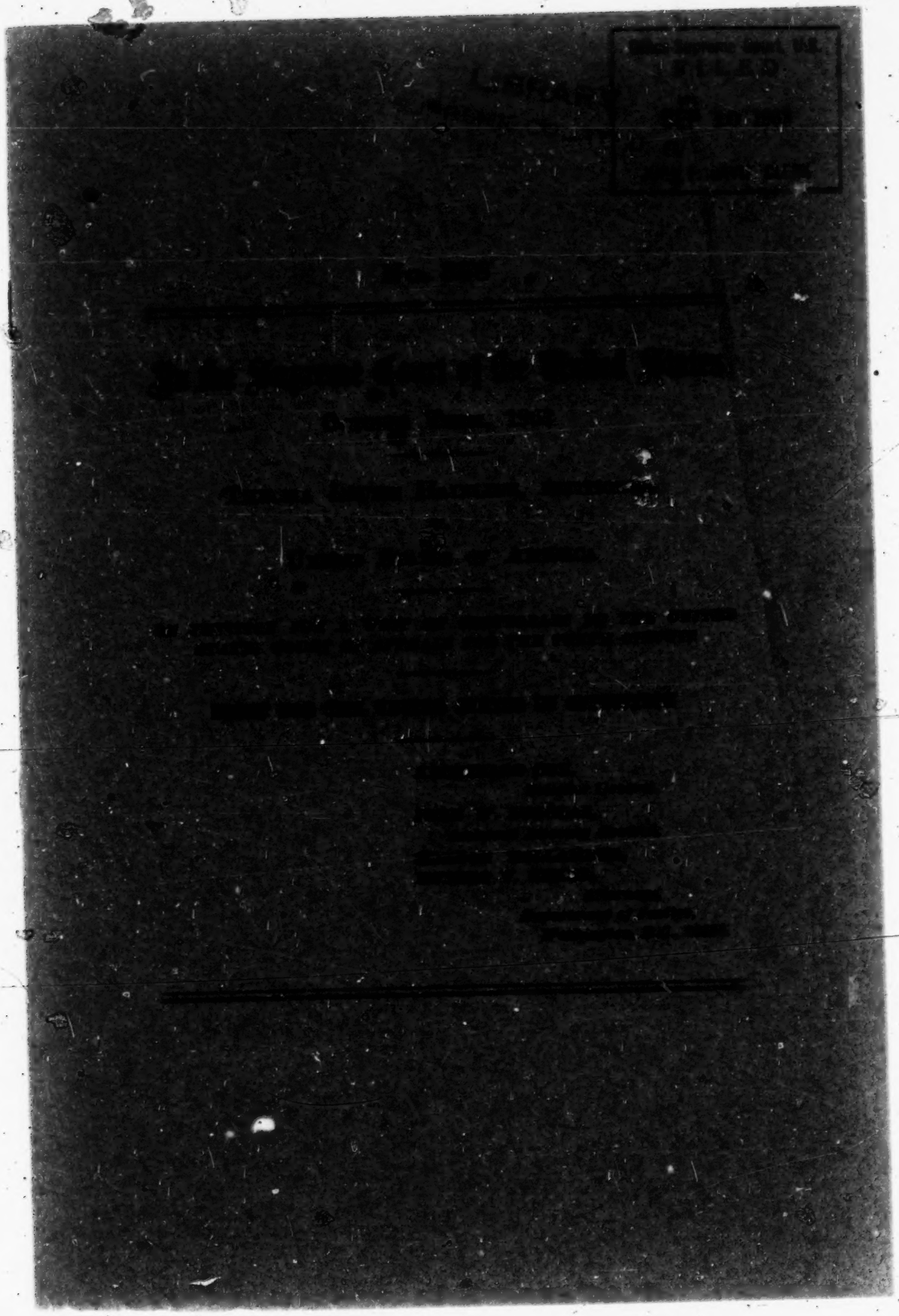

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 358

THELMA LOUISE HAINLINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusion of law and the oral opinion of the United States District Court for the District of Kansas (Pet. App. A1–A12) are not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. A13–A18) is reported at 315 F. 2d 153.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1963. On June 24, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 23, 1963. The petition for a writ of certiorari was filed August 10, 1963.

705-087—63

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly interpreted the Kansas law of *respondeat superior* in refusing to hold the United States liable for injuries caused by an Air Force officer who, while off duty and for his personal benefit and enjoyment, was flying an airplane owned not by the government but by an Aero Club of which he was a member.[1]

STATUTES AND REGULATIONS INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, in pertinent part, provides:

§ 1346

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting

[1] Petitioner also raises the question of whether the district court had authority to award interest against the United States from the date of judgment (Pet. 12). A reading of the relevant statutes makes it perfectly clear that the district court had no such authority. 28 U.S.C. 2411(b), 31 U.S.C. 724a. In any event, the court of appeals did not reach the interest point, since it held that no judgment in any amount should have been rendered against the United States.

within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

2. Air Force Regulation AFB 176–8, paragraphs 13 and 14 and attachment 6, is set forth at pp. A27 to A32 and pp. A36 to A38 of the Appendix to the petition for a writ of certiorari.

STATEMENT

This action was brought under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401(b) and 2671–2680) for injuries sustained by plaintiff when the

right landing gear of a Cessna light plane owned by the SAC Aero Club of McConnell Air Force Base, Kansas, scraped the top of her truck (R. 1, 26, 32).

The pilot of the plane, Henry Goff, was a lieutenant in the Air Force, attending Ground School at McConnell Air Force Base for the piloting of B-47 bombers (R. 28–29). When the accident happened he was off duty and the flight did not count toward his flying time for the Air Force. He had joined the Club shortly before the accident and had paid from his own pocket the initiation fee and the charge for flying the plane involved in the accident (R. 28–29). The accident occurred as Goff was making a solo landing approach. The right landing gear of the plane hit the top and front edge of the cab of a truck driven by the plaintiff, who sustained cuts and abrasions, and an abnormal psychological reaction which lessened her ability to work (R. 29, 38–39, 47).

The Aero Club of McConnell Air Force Base was at the time of the accident a nonappropriated fund activity providing its members with recreational flying in light planes (R. 33, 40–41, 49). Membership was voluntary; no one was required to join the Club, and members could resign at any time they wished (R. 40). Civilian employees of the Air Force and retired military personnel and their dependents, as well as personnel on active duty and their dependents, were eligible for membership (R. 50). Activities of Club members were limited to off-duty hours, and officers and instructors of the Club who were also Air Force officers were similarly required to fulfill their Club duties on their own time (R. 30, 33).

Members of the Club were under no affirmative obligation other than to pay dues and fees (R. 50); there was no evidence of a requirement that the members do any flying. Goff was apparently not an officer of the Club nor an instructor hired to teach Club members to fly, but simply a member entitled to use Club facilities.

The district court found that Goff's negligence caused the accident and gave judgment for petitioner in the amount of $12,467.46, with interest from the date of judgment (R. 16). The court of appeals reversed on the ground that, under Kansas law, Goff was not acting within the scope of his employment as an officer of the United States Air Force at the time of the accident.

ARGUMENT

1. Petitioner's basic contention is that "the Tenth Circuit Court of Appeals has construed the Kansas law on respondeat superior too narrowly in reaching its decision" (Pet. 11). Plainly, that allegation presents no question appropriate for review in this Court. In any event, the decision below is correct. Petitioner concedes, as he must under *Williams* v. *United States*, 350 U.S. 857, that the question whether Goff was acting within the scope of his employment by the Air Force at the time of accident is governed by Kansas law. The court of appeals found that the Kansas courts resolve the question by determining whether the employer had the right to direct and control the employee's activities. Applying this test, the court of appeals held that under Kansas law Goff

was not acting within the scope of his employment as an officer of the United States Air Force at the time of the negligent act (Pet. App. A16–A17). Goff was off duty when the accident occurred and was at liberty to do what he pleased. He was not directed by anyone to make the flight which caused the accident, and the rental charge for the aircraft he was flying came from his own pocket (Pet. App. A15, R. 28–29). As the court of appeals noted, he was acting for his personal benefit and enjoyment and in no way furthering the business interests of the United States at the time of the accident (Pet. App. A16). The Kansas cases relied on by the court of appeals (Pet. App. A16) clearly demonstrate that, in these circumstances, Goff was not, under Kansas law, acting within the scope of his employment as an officer of the United States Air Force.

2. Petitioner also contends that the court of appeals should have affirmed the judgment on the ground that the United States Air Force and the Aero Club were "joint employers" (Pet. 10). To the extent that this "joint employment" contention is not simply an attempt to reargue the question of Kansas law as to the scope of Goff's employment by the Air Force, the argument must rest on two propositions: (i) that Goff was an "employee" of the Aero Club, and (ii) that the Aero Club was a "federal agency," all within the meaning of the Tort Claims Act. But, as the court of appeals held, Goff was plainly not an employee of the Aero Club. He received no pay for flying a Club airplane; indeed, he had to pay from his own pocket the hourly rental fee charged (R. 29).

As a member of the Club, he had no affirmative duty other than payment of fees and dues (R. 50). No one required him to fly the aircraft involved here. There was no evidence that he was an officer of the Club or performed any duties in connection with the administration or operation of the Club. He simply used the Club's facilities, in the same manner that a member of the officers' club might use its golf course or its swimming pool, or a member of the officers' mess might eat his dinner at the mess.[2]

Thus, the fact that Goff was not an "employee" of the Aero Club makes it unnecessary to reach the further question whether the Aero Club is an instrumentality of the United States under *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, and whether, if the Club is such an instrumentality, it is also a "federal agency" within the meaning of the Federal Tort Claims Act. At the same time, the absence of any employment relationship between Goff and the Aero Club refutes the suggestion of conflict between the decision below and *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4). In *Holcombe*, the United

[2] Petitioner cites an Air Force regulation which provides that members of aero clubs are "employees" for the purpose of the paragraph of the regulation concerning administrative review and settlement of tort claims involving nonappropriated fund activities (Pet. 7, Pet. App. A28–A32). However, even if the Air Force had the power to expand the liability of the United States as fixed by the Tort Claims Act, the regulation was clearly not intended to affect Tort Claims Act liability. For payment of claims processed under the regulation is provided for out of nonappropriated funds (AFR 176-8, ¶14d and attachment 6 (Pet. App. A30–A31, A36–A38)), while payment of claims under the Tort Claims Act is made from appropriated funds. 28 U.S.C. 2411(b); 31 U.S.C. 724a.

States was held liable only because the tortfeasor was an employeee—not a member—of an officers' mess. Indeed, the court below was of the view that the United States would be liable for the negligence of an Aero Club employee.

CONCLUSION

The decision below turns on a question of state law. Moreover, the decision is correct and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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